in the thing itself which constitutes the subject matter of the agency, and not a mere interest in the proceeds from the exercise of the power.[2] Thus a power of sale in a mortgage, a power to carry on a business together with an assignment of the business, are powers coupled with an interest;[3] while a power to sell property and reimburse one's self from the proceeds, a power to an insurance agent to retain fifty per cent of the premiums as commissions, are examples of powers not coupled with an interest.[4] Mere possession of the subject matter of the agency has been held in an early New York case to be such an interest as will render the power irrevocable,[5] though this seems to be doubted in a recent decision of the Appellate Division of the New York Supreme Court which fails to mention the earlier adjudication. *Hoffman, Administrator* v. *Union Dime Savings Institution*, 109 N. Y. App. Div. 24. An apparent extension of the rule to an entirely new class of cases is made by the United States Supreme Court in holding that a power given to a firm of attorneys to prosecute and compromise a suit and to receive a percentage of the proceeds as compensation is not terminated by the principal's death, being coupled with an interest.[6] Its principle has, however, been limited and in effect, it would seem, overruled by a subsequent decision of the same court in which the only distinction made was that the authority did not include a power to compromise.[7] The trend of recent decisions seems to favor strongly the narrower definition.[8] The conception of a power coupled with an interest is found in Coke, whose definition corresponds with that to be found in the American cases.[9]

The modern English view, however, is said to be broader. Where a power is given for a valuable consideration to secure some benefit to the donee of the authority, the power is said to be coupled with such interest as to make it irrevocable.[10] This does not require an interest in the subject matter of the agency; an interest in the proceeds from the exercise of the power is sufficient. On the continent, indeed, the law seems settled in favor of the broader rule.[11] The issue in the English cases, however, was as to the revocability of the power *inter vivos*, an entirely different thing from its termination by death; and they could have been decided in the same way under the narrower rule laid down by Chief Justice Marshall.[2] While the statements of text-writers and the language used by courts undoubtedly do go so far as to consider such a power not terminated by the principal's death, no express decision has been found in support of the broader doctrine.

CIVIL LIABILITY ARISING FROM VIOLATION OF MUNICIPAL ORDINANCES. — An exception, everywhere recognized in the United States, to the fun-

---

[2] Hunt *v.* Rousmanier's Admrs., 8 Wheat. (U. S.) 174.

[3] Conners *v.* Holland, 113 Mass. 50; Durbrow *v.* Eppens, 65 N. J. Law 10.

[4] Fisher *v.* Southern Loan & Trust Co., 138 N. C. 90; Andrews *v.* Travelers' Insurance Co., 24 Ky. Law Rep. 844.

[5] Knapp *v.* Alvord, 10 Paige (N. Y.) 205.

[6] Jeffries, Admr. *v.* The Mutual Life Insurance Co., 110 U. S. 305.

[7] Missouri, *ex rel.* Walker *v.* Walker, 125 U. S. 339.

[8] Fisher *v.* Southern Loan & Trust Co., *supra;* Andrews *v.* Travelers' Insurance Co., *supra;* Black *v.* Harsha, 7 Kan. App. 794.

[9] Co. Litt. 49b, 52b, 181b.

[10] Smart *v.* Sandars, 5 C. B. 895, 917; *In re* Hannan's Express Gold Mining & Developing Co., [1896] 2 Ch. 643.

[11] See 1 Holtzendorff, Encyklopädie der Rechtswissenschaft 599.

damental rule that the authority to make laws cannot be delegated by the legislature, allows certain powers of local legislation to be conferred upon municipal corporations. The police powers of the state are commonly granted to municipalities, and ordinances passed under that delegated power are as binding within the municipal limits as are the acts of the legislature itself.[1] There is no conflict as to the direct effect of such ordinances, but courts differ in interpreting the indirect effect. The Supreme Court of Missouri recently refused to follow the earlier decisions in that state,[2] which hold that civil liability between individuals cannot be created by municipal ordinance. *Sluder* v. *St. Louis Transit Co.*, 189 Mo. 107.

It is the generally accepted doctrine that such liability may result from legislative enactment and that a private individual can recover in a tort action if he is damaged by a breach of duty imposed by the legislature. Courts state the ground for recovery in different ways. Some call the breach negligence *per se*.[3] Others call it *prima facie* evidence of negligence.[4] They all go so far as to hold that if the legislature imposes a duty which is owed to citizens as individuals and not to the municipality or public at large, a plaintiff to whom the duty is owed, can, unless the legislature has showed a contrary intent, recover for damage caused to him by a breach. The liability of the defendant is really not based upon negligence, as the exercise of care cannot be offered as a defense. Nor is he absolutely liable for the results of his unlawful action, for it has been held that the defendant may show a justification for his violation of the law and thus escape civil liability.[5] It is of course necessary for the plaintiff to establish the causal relation between the defendant's breach and his own damage in order to make out his case, and the mere fact that the defendant is acting unlawfully at the time is not enough to make him liable.[6] The liability results from the legislature's implied intent to impose it. The duty in many statutes is created wholly or in part for the benefit of individuals. The temptation to violate the duty for the sake of pecuniary gain is frequently so great that it is advisable to add to the penalty expressly imposed civil liability in those cases where the breach results in damage to an individual.

A few jurisdictions refuse to allow a tort action when the duty is imposed by a municipal ordinance.[7] They argue that the municipality is empowered to pass laws for particular local purposes, but that it cannot create new civil liabilities between individuals. They hold that limited punishments may be inflicted by the municipality for breach of the ordinances, but that the legislature cannot delegate the power to subject individuals to civil liability where the damages recoverable have no definite limit. The only duty owed under an ordinance, according to these authorities, is to the municipality.

A large majority of jurisdictions, however, make no distinction between legislative and municipal enactments,[8] and this position seems correct. An act of the legislature passed under the police power creates civil liability.

---

1 Barbier *v.* Connolly, 113 U. S. 27.
2 See Byington *v.* St. Louis Rd. Co., 147 Mo. 673.
3 Dodge *v.* The Burlington, C. R & M. Rd. Co., 34 Ia. 276.
4 The Illinois Central Rd. Co. *v.* Gillis, 68 Ill. 317.
5 See Hanlon *v.* South Boston Horse Rd. Co., 129 Mass. 310.
6 Briggs *v.* The New York Central, etc., Rd. Co., 72 N. Y. 26.
7 Philadelphia and Reading Rd. Co. *v.* Ervin, 89 Pa. St. 71.
8 Hayes *v.* Michigan Central Rd. Co., 111 U. S. 228.

The legislature can delegate the right to pass that act. It is difficult to see why the act should have one effect when the legislature passes it itself, and another when the legislature's delegate passes it. It is binding law in both cases. In each a duty is created. There is no evidence that the legislature intends to delegate only part of its power. If the legislature creates the duty by a clause in the city's charter, the duty is owed to individuals. If the charter empowers the municipality to create the duty, it is reasonable to suppose that the legislature intends the same result to follow.[9]

RESCISSION AND REFORMATION FOR MUTUAL MISTAKES OF FACT. — A distinction should be drawn between three classes of cases in which, on account of a mutual mistake of fact, equity is asked to give affirmative relief in the nature of rescission or reformation. The simplest of them arises from a failure to complete the formation of a legal contract. For example, the ostensible agreement may be capable of two reasonable interpretations, one of which is accepted by each party, as where A, with two lots in Boston, agrees to sell "my lot in Boston." Other elements of a contract, a supposed party, or consideration, may be non-existent. Since the invalidity of the contract is recognized at law, the intervention of equity is generally unnecessary. If, however, a bond or a deed has been delivered by way of partial performance, a bill *quia timet* might bring relief through cancellation of the instrument. In a second class of cases a legally valid contract has been entered into under a mutual mistake as to certain material facts which form the conscious inducement of the contract. The mutual error may be as to the quality or identity of land sold, the quantity of land in a parcel (rescission, however, being usually granted in the latter case only where the error is considerable), the nature or character of a chattel. Here there can be no true reformation, since there is no previous contract with which the mistaken agreement can be squared. Hence equity will conclude that there would have been no contract had the mutual error not been made, but cannot go further and create the contract that might have been formed. Sometimes, as where a party has received more or less land than he paid for, and justice is best subserved thereby, equity may allow the defendant an election between rescission and a money payment.[1] But ordinarily rescission is the only remedy.[2] In a recent New York case, for example, a real estate broker employed to sell lot A mistakenly pointed out lot B as the one for sale. The plaintiff agreed to buy and signed a contract properly describing lot A. Because of the blunder the court properly decreed a rescission. *Silverman* v. *Minsky*, 109 N. Y. App. Div. 1. Had authority been given the agent to dispose of lot B also, the case might be one for reformation on the principles which govern the third class of cases.

In this class there is an initial contract, the expression or performance of which in a written contract or deed is, because of mutual mistake or the mistake of one party and the fraud of the other, incorrect. Here equity makes the performance or contract conform to the original agreement by such decree as seems proper. To this end one who has gained or retained

---

[9] See Taylor *v.* The Lake Shore, etc, Rd. Co., 45 Mich. 74.

[1] Lawrence *v.* Staigg, 8 R. I. 256; Miller *v.* Craig, 83 Ky. 623.

[2] Hitchcock *v.* Giddings, 4 Price 135; Bigham *v.* Madison, 103 Tenn. 358.